BEFORE THE

SURFACE TRANSPORTATION BOARD

Ex Parte No. 676

Rail Transportation Contracts Under 49 U.S.C. 10709

REPLY COMMENTS

submitted by

AMERICAN CHEMISTRY COUNCIL
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.
EDISON ELECTRIC INSTITUTE
THE FERTILIZER INSTITUTE
THE NATIONAL GRAIN AND FEED ASSOCIATION
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
MONTANA WHEAT & BARLEY COMMITTEE
IDAHO WHEAT COMMISSION
IDAHO BARLEY COMMISSION
WASHINGTON WHEAT COMMISSION
SOUTH DAKOTA WHEAT COMMISSION
NEBRASKA WHEAT BOARD
OKLAHOMA WHEAT COMMISSION
TEXAS WHEAT PRODUCERS BOARD
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
ALLIANCE FOR RAIL COMPETITION

Due and Dated: March 9, 2009

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The above-listed Interested Associations respectfully submit their Reply Comments in this proceeding. These Interested Associations submitted extensive Comments on February 5, in response to the Board's Notice of Proposed Rulemaking, in which the Board proposed to amend its rules to provide that: (1) where an agreement for rail carriage contains a specified disclosure statement, the Board will not find jurisdiction over a dispute involving the rate or service and will treat that agreement as a rail transportation contract; and, (2) where an agreement fails to contain the disclosure statement, the Board will find jurisdiction over the involved dispute, absent clear and convincing evidence. In their February 5 Comments, these Interested

Associations strongly opposed the proposed rule and asked the Board to terminate this proceeding.

A review of the comments submitted by other parties on February 5 reveals widespread dissatisfaction with and questions about the Board's proposal. Several shipper commenters were flatly opposed to the Board's proposed rule. See, Comments of PPG Industries, pp. 6-7 ("PPG strongly opposes the proposed rule . . ."); Opening Comments of NASSTRAC, pp. 2, 11. The Western Coal Traffic League indicated that the Board's proposal did not address key issues, and concluded that it "continues to have serious concerns about the efficacy and details of the Board's proposal, and whether it will represent a net improvement" over the Board's current case-by-case approach. WCTL Comments, pp. 2-4.

The railroad industry did not submit consolidated comments, but instead individual railroads filed separate comments. Although a review of those comments reveals a few nods of support for the Board's intentions, not a single rail carrier endorsed the Board's proposed rule in its entirety, and each carrier indicated either that it preferred not to have the rule, or that there were serious flaws in the Board's proposal and that the rule needed significant modification:

- KSC broadly "questions the need for the proposed disclosure requirement and prefers that the Board continue with its existing practice of resolving on a case-by-case basis whether rail traffic was moved under contract or pursuant to common carriage." KCS Comments, p. 2.
- UP concludes that the proposed rule "creates new uncertainties regarding the applicability of the proposed contract disclosure requirement and its effects on a wide range of railroad-shipper agreements," noting that the Board's rule is an "incomplete and incorrect state of law in some circumstances," and "creates uncertainty in everyday complex

commercial dealings . . ." UP Comments, pp. 1, 4, 7. UP's Comments detail a wide variety of problems with the proposed rule.

- Norfolk Southern notes that the Board's proposal has "several serious flaws" including the "creation of a jurisdictional gap" and would lead to "potential unintended consequences." NS Comments, p. 3.
- BNSF, though it generally supports the Board's proposal, suggests key changes to the Board's presumptions when a disclosure statement is not placed on a document. BNSF Comments, pp. 5, 6.
- CSXT, perhaps the most favorably inclined of the five railroad commenters, still notes the presence of a "jurisdictional quandary" and proposes a number of changes. CSXT Comments, pp. 2, 4-6.

The Interested Associations believe that the changes proposed by the railroads to the problems that the carriers identify would exacerbate the problems with the Board's rule, in that those changes would make it even more likely that the unfair practices outlined in the Interested Parties' February 5 Comments would occur. Many of the carriers' suggested changes would water down even further the content of the disclosure statement, and make it even more likely that the use of "magic words" could be used to shield a variety of unfair practices from regulatory scrutiny. See, e.g., UP Comments, pp. 3-4 (suggesting elimination of the last three sentences of the proposed disclosure language, and urging that only the first sentence be retained, stating only that "[t]his agreement constitutes a rail transportation contract under 49 U.S.C. 10709"); CSXT Comments, pp. 4-5 (suggesting elimination of several proposed requirements for the disclosure statement); BNSF Comments, pp. 5-6 (suggesting elimination of the presumption that agreements not containing a disclosure statement would be common carriage and the

requirement that the carrier prove that the shipper was made aware that it had a right to a common carrier tariff). The effect of these suggestions would be to eliminate any information that would inform the shipper of its rights. Thus, the Interested Associations urge the Board not to adopt the various suggestions submitted by the railroad commenters.

A review of the entire record in this proceeding suggests that the Board should do what the Interested Associations have urged: namely, to terminate this proceeding without adopting the proposed rule. In addition to the serious legal infirmities and policy problems detailed by the Interested Associations in their February 5 comments, the Board's proposal poses a substantial danger of a wide range of serious potential unintended consequences, extending from the Interested Associations' concerns that the proposal will facilitate a wide variety of unfair practices, to the railroads' concerns about "new uncertainties," "serious flaws," "jurisdictional gaps," "jurisdictional quandaries" and a host of other problems. If any particular shipper is unsure whether or not it has a contract, it can simply insist that the railroad tell it whether the document being discussed is or is not a contract within the meaning of 49 U.S.C. 10709. Thus, no rule is necessary. The law, sound policy, and simple prudence all dictate that the Board should terminate this rulemaking.

Respectfully submitted,

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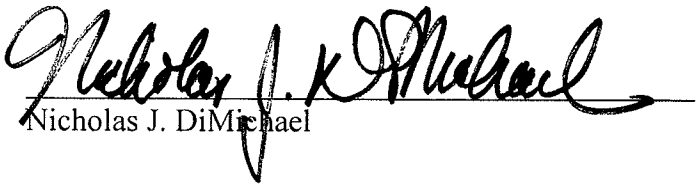
Due and dated: March 9, 2009

CERTIFICATE OF SERVICE

This is to certify that on this 9th day of March 2009, a true and correct copy of the foregoing Comments were served upon all parties of record via first class mail, postage pre-paid.



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